

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** )  
 )  
 **TYSON FOODS, INC., et al.,** )  
 )  
 **Defendants.** )

**Case No. 05-cv-329-GKF(SAJ)**

**STATE OF OKLAHOMA'S MOTION TO EXPAND THE DISCOVERY  
PERIOD AND INTEGRATED BRIEF IN SUPPORT THEREOF**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State") respectfully moves this Court to enter an order expanding the discovery period. In support of this Motion, the State states as follows:

1. This Court ordered a temporal limit on certain document discovery in this case. *See* July 6, 2007, p. 2 [DKT #1207]. Specifically, this limitation applies to all documents except documents relating to Defendants' corporate knowledge. *See* July 6, 2007 Order, p. 3 [DKT. #1207].

2. Importantly, however, the Court’s limitation is not written in stone. In fact, the Court has invited the State to submit evidence showing why documents created more than five years ago may be relevant. As the Court explained:

The court is not able to determine the validity of Plaintiff's position without extensive briefing on the legal issues presented and expert testimony on the impact of chicken waste application in the distant past upon the current condition of the watershed. Even if the court should determine that such evidence is relevant, additional testimony would be needed to determine whether the costs of producing such documents outweighs their probative value.

July 6, 2007 Order, p. 2 [DKT. #1207].

3. The Court has subsequently reiterated this position. *See* Oct. 24, 2007 Order, p. 7 [DKT. #1336] ("... Any other knowledge or preparation requirement is governed by a five (5) year limit unless the Court finds evidence beyond the five (5) year limit is relevant after proper application and evidentiary hearing").

4. Consistent with the Court's orders, the State now submits evidence in support of its position that a five-year limitation on certain discovery is unwarranted. *See* Ex. 1 (Phillips Aff.). This evidence supports the propositions that:

(a) poultry waste application in the "distant past" (*i.e.*, more than five years ago) has adversely impacted (*i.e.*, injured) the current condition of the watershed; and

(b) poultry waste application in the "distant past" (*i.e.*, more than five years ago) adversely impacted (*i.e.*, injured) the condition of the watershed at or about the time of that poultry waste application.

5. Specifically, Ms. Phillips' affidavit explains that phosphorus released into the environment more than five years ago is causing harm today. *See* Ex. 1 (Phillips Aff., ¶¶ 2 & 9-10 (on pp. 9-11)). Additionally, her affidavit explains that phosphorus released more than five years ago caused harm more than five years ago. *See* Ex. 1 (Phillips Aff., ¶¶ 6-8, 10 (on p. 8) & 10 (on p. 11)). Finally, her affidavit explains that run-off from the land application of poultry waste is and has been a contributor to the resultant water quality problems. *See* Ex. 1 (Phillips Aff., ¶ 10 (on p. 11)).

6. Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . Relevant information need not be admissible at the trial if the discovery appears

reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *General Electric Capital Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003). The Supreme Court interprets relevancy in the discovery context "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 98 S.Ct. 2380, 2389 (1978).

7. Inasmuch as the State is seeking relief for injuries caused not only by "present" conduct, but also by "past" conduct, *see, e.g.*, Second Amended Complaint, ¶ 1<sup>1</sup> [DKT #1215], information referring or relating to poultry operations in the Illinois River Watershed by Defendants more than five years ago is highly relevant. Such information shows causation of the past injuries, as well as the present injuries, for which the State is seeking damages and other

---

<sup>1</sup> Paragraph 1 of the Second Amended Complaint states:

It has been, and continues to be, the Poultry Integrator Defendants' practice to store and dispose of this waste on the lands within the IRW -- a practice that has caused injury to the IRW, including the biota, lands, waters and sediments therein. The Poultry Integrator Defendants are responsible for this injury. Accordingly, pursuant to federal and state law, the State of Oklahoma brings this action against the Poultry Integrator Defendants seeking, *inter alia*, abatement of these practices, expenses for assessing the injury and damage to the IRW (including the biota, lands, waters and sediments therein) caused by these practices, remediation of the injury to the IRW (including the lands, waters and sediments therein) caused by these practices, damages for the lost value and restoration of the natural resources of the IRW caused by these practices, and equitable relief.

(Emphasis added.)

relief. It is axiomatic that evidence reflecting conduct pertaining to causation of an injury is highly relevant.<sup>2</sup>

8. Accordingly, any documents, regardless of their age, reflecting information about Defendants' operations and waste handling practices in the Illinois River Watershed are relevant to the issue of past and present environmental injuries, damages and relief and, therefore, should be discoverable.

9. Additionally, information referring or relating to poultry operations in the Illinois River Watershed by Defendants more than five years ago is relevant on the issue of punitive damages. *See, e.g.*, 23 Okla. Stat. § 9.1(A)(1) (providing that the duration of the misconduct is a factor in determining punitive damages).

10. Therefore, the probative value of such information easily outweighs any costs of providing such information.

Therefore, the State's Motion to Expand the Discovery Period to include all responsive information pertaining to the Illinois River Watershed, regardless of its age, should be granted.

---

<sup>2</sup> Lest it be argued that a statute of limitation bars discovery of this otherwise relevant information, it is important to note that the statute of limitations under Oklahoma law does not run against the State when it is acting, as is the case here, in its sovereign capacity to enforce a public right. *See State v. Tidmore*, 674 P.2d 14, 15 (Okla. 1983) ("We have long-recognized the general rule that statutes of limitations do not operate against the state when it is acting in its sovereign capacity to enforce a public right") (citations omitted); *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1988) ("From these cases we distill the general rule that statutes of limitation shall not bar suit by any government entity acting in its sovereign capacity to vindicate public rights, and that public policy requires that every reasonable presumption favor government immunity from such limitation").

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
ATTORNEY GENERAL  
Kelly H. Burch OBA #17067  
J. Trevor Hammons OBA #20234  
Tina Lynn Izadi OBA #17978  
Daniel P. Lennington OBA #21577  
ASSISTANT ATTORNEYS GENERAL  
State of Oklahoma  
313 N.E. 21<sup>st</sup> St.  
Oklahoma City, OK 73105  
(405) 521-3921

/s/ Richard T. Garren

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Douglas A. Wilson OBA #13128  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

Louis Werner Bullock OBA #1305  
James Randall Miller OBA #6214  
MILLER, KEFFER & BULLOCK  
110 West Seventh Street Suite 707  
Tulsa OK 74119  
(918) 584-2001

David P. Page OBA #6852  
BELL LEGAL GROUP  
P. O. Box 1769  
Tulsa, Ok 74101-1769  
(918) 398-6800

Frederick C. Baker  
(admitted *pro hac vice*)

Lee M. Heath  
(admitted *pro hac vice*)  
Elizabeth C. Ward  
(admitted *pro hac vice*)  
Elizabeth Claire Xidis  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

William H. Narwold  
(admitted *pro hac vice*)  
Ingrid L. Moll  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
20 Church Street, 17<sup>th</sup> Floor  
Hartford, CT 06103  
(860) 882-1676

Jonathan D. Orent  
(admitted *pro hac vice*)  
Michael G. Rousseau  
(admitted *pro hac vice*)  
Fidelma L. Fitzpatrick  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
321 South Main Street  
Providence, RI 02940  
(401) 457-7700

Attorneys for the State of Oklahoma

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of December, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly H. Burch, Assistant Attorney General  
J. Trevor Hammons, Assistant Attorney General  
Tina Lynn Izadi, Assistant Attorney General  
Daniel P. Lennington, Assistant Attorney General

fc\_docket@oag.state.ok.us  
kelly\_burch@oag.state.ok.us  
trevor\_hammons@oag.state.ok.us  
tina\_izadi@oag.state.ok.us  
daniel.lennington@oag.ok.gov

M. David Riggs

driggs@riggsabney.com

Joseph P. Lennart  
Richard T. Garren  
Douglas A. Wilson  
Sharon K. Weaver  
Robert A. Nance  
D. Sharon Gentry  
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

jlennart@riggsabney.com  
rgarren@riggsabney.com  
doug\_wilson@riggsabney.com  
sweaver@riggsabney.com  
rnance@riggsabney.com  
sgentry@riggsabney.com

Louis Werner Bullock  
James Randall Miller  
MILLER, KEFFER & BULLOCK

lbullock@bullock-blakemore.com  
rmiller@mkblaw.net

David P. Page  
BELL LEGAL GROUP

dpage@edbelllaw.com

Frederick C. Baker  
Lee M. Heath  
Elizabeth C. Ward  
Elizabeth Claire Xidis  
William H. Narwold  
Ingrid L. Moll  
Jonathan D. Orent  
Michael G. Rousseau  
Fidelma L. Fitzpatrick  
MOTLEY RICE, LLC  
**Counsel for State of Oklahoma**

fbaker@motleyrice.com  
lheath@motleyrice.com  
lward@motleyrice.com  
cxidis@motleyrice.com  
bnarwold@motleyrice.com  
imoll@motleyrice.com  
jorent@motleyrice.com  
mrousseau@motleyrice.com  
ffitzpatrick@motleyrice.com

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Robert E Sanders  
Edwin Stephen Williams  
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.**

John H. Tucker  
Theresa Noble Hill  
Colin Hampton Tucker  
Leslie Jane Southerland  
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com  
thill@rhodesokla.com  
ctucker@rhodesokla.com  
ljsoutherland@rhodesokla.com

Terry Wayen West

terry@thewestlawfirm.com

THE WEST LAW FIRM

Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Dara D. Mann	dmann@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
FAEGRE & BENSON, LLP	
<b><u>Counsel for Cargill, Inc. &amp; Cargill Turkey Production, LLC</u></b>	

James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Paul E. Thompson, Jr	pthompson@bassettlawfirm.com
BASSETT LAW FIRM	

George W. Owens	gwo@owenslawfirmpc.com
Randall E. Rose	rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.	
<b><u>Counsel for George's Inc. &amp; George's Farms, Inc.</u></b>	

A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	

Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<b><u>Counsel for Peterson Farms, Inc.</u></b>	

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<b><u>Counsel for Simmons Foods, Inc.</u></b>	

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	



Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Thomas C. Green  
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com  
jjjorgensen@sidley.com  
twebster@sidley.com  
tcgreen@sidley.com

Robert W. George  
Michael R. Bond  
Erin W. Thompson  
KUTAK ROCK, LLP

robert.george@kutakrock.com  
michael.bond@kutakrock.com  
erin.thompson@kutakrock.com

**Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.**

R. Thomas Lay  
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

Jennifer Stockton Griffin  
David Gregory Brown  
LATHROP & GAGE LC

jgriffin@lathropgage.com

**Counsel for Willow Brook Foods, Inc.**

Robin S Conrad  
NATIONAL CHAMBER LITIGATION CENTER

rconrad@uschamber.com

Gary S Chilton  
HOLLADAY, CHILTON AND DEGIUSTI, PLLC

gchilton@hcdattorneys.com

**Counsel for US Chamber of Commerce and American Tort Reform Association**

D. Kenyon Williams, Jr.  
Michael D. Graves  
Hall, Estill, Hardwick, Gable, Golden & Nelson

kwilliams@hallestill.com  
mgraves@hallestill.com

**Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.**

Richard Ford  
LeAnne Burnett

richard.ford@crowedunlevy.com  
leanne.burnett@crowedunlevy.com

Crowe & Dunlevy  
**Counsel for Oklahoma Farm Bureau, Inc.**

Kendra Akin Jones, Assistant Attorney General  
Charles L. Moulton, Sr Assistant Attorney General

Kendra.Jones@arkansasag.gov  
Charles.Moulton@arkansasag.gov

Also on this 21<sup>st</sup> day of December, 2007 I mailed a copy of the above and foregoing pleading to:

**David Gregory Brown**  
Lathrop & Gage LC  
314 E HIGH ST  
JEFFERSON CITY, MO 65101

**Thomas C Green**  
Sidley Austin Brown & Wood LLP  
1501 K ST NW  
WASHINGTON, DC 20005

**Cary Silverman**  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)  
600 14TH ST NW STE 800  
WASHINGTON, DC 20005-2004

**C Miles Tolbert**  
Secretary of the Environment  
State of Oklahoma  
3800 NORTH CLASSEN  
OKLAHOMA CITY, OK 73118

**Gary V. Weeks**  
Bassett Law Firm  
P. O. Box 3618  
Fayetteville, AR 72702

**Dustin McDaniel**  
**Justin Allen**  
Office of the Attorney General (Little Rock)  
323 Center St, Ste 200  
Little Rock, AR 72201-2610

---

/s/ Richard T. Garren